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S.M., Appellant)	
)	
and)	Docket No. 20-0083
)	Issued: April 13, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
EDITH NOURSE ROGERS MEMORIAL)	
VETERANS HOSPITAL, Bedford, MA,)	
Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

On October 9, 2019 appellant filed a timely appeal from a May 9, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 1, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 26, 2012 appellant, then a 42-year-old telephone operator, filed a traumatic injury claim (Form CA-1) alleging that on April 24, 2012 she injured her right ankle, neck, shoulders, and arms when she tripped on an uneven concrete walkway while in the performance of duty. OWCP accepted the claim for an anterior and posterior talofibular sprain of the right ankle, tenosynovitis of the right ankle, a syndesmosis sprain of the right ankle, and a right lisfranc sprain with contusion. It subsequently expanded the acceptance of the claim to include an aggravation of preexisting cervical degenerative disc disease. OWCP paid appellant wage-loss compensation from June 11, 2012 to March 2, 2015.

In a report dated February 27, 2014, Dr. Steven Silver, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed degenerative disc disease of the cervical spine, a sprain of the anterior and posterior talofibular ligament, and a right ankle syndesmosis sprain. He found no objective cervical findings on examination, but objective residuals of her right foot injury. Dr. Silver opined that appellant could perform modified employment.

In an August 5, 2014 work capacity evaluation (OWCP-5c), Dr. Brian C. Dressel, a treating physician Board-certified in family practice, found that appellant was disabled from employment due to neck pain, severe headaches, and her inability to sit or stand prolonged periods. In a narrative report of the same date, he diagnosed cervical spondylosis with myelopathy.

OWCP determined that a conflict in medical opinion existed between Dr. Silver and Dr. Dressel regarding the extent of appellant's disability from employment. It referred her to Dr. Richard Warnock, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 22, 2014, Dr. Warnock discussed appellant's April 24, 2012 employment injury and noted that she had an extensive history of neck pain. On examination he found no cervical tenderness or spasms, full motion of the shoulder and right ankle, with no instability, a negative drawer sign, and slight tenderness at the anterior talofibular ligament. Dr. Warnock diagnosed a sprained right ankle, cervical strain, and chronic degenerative disc disease. He found that the aggravation of appellant's cervical condition and right ankle sprain had resolved and that she had no restrictions as a result of her accepted employment injury. Dr. Warnock found that a lifting restriction of 25 pounds was reasonable due to her preexisting condition.

On January 29, 2015 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits as she had no further disability or residuals of her accepted April 24, 2012 employment injury.

By decision dated March 3, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Warnock, the impartial medical examiner, represented the special weight of the evidence and established that she had no further disability or residuals of her accepted employment injury.

On April 3, 2015 through her then-counsel, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She subsequently requested a review of the written record in lieu of an oral hearing.

By decision dated December 9, 2015, OWCP's hearing representative affirmed the March 3, 2015 decision.

Appellant continued to submit progress reports from Dr. Dressel. In a report dated November 18, 2016, Dr. Dressel noted that he had treated appellant since 2012 for chronic neck pain due to cervical spondylosis and stenosis at multiple levels. He opined that the April 2012 employment injury had exacerbated her pain and caused a right ankle injury. Appellant also experienced increased migraines and tensions headaches due to the aggravation of her neck pain. Dr. Dressel related that the "combination of her neck pain and migraines have prevented her from returning to work, due to both physical limitations as well as impaired concentration from her migraines." He found that appellant was unable to resume employment.

On December 6, 2016 appellant requested reconsideration.

In an undated statement received December 6, 2016, P.H., who accompanied appellant to Dr. Silver, alleged that he had not listened to the appellant and had caused her pain during his examination. In a separate statement, P.H. related that Dr. Warnock had failed to let appellant fully explain her situation and caused her pain during the examination.

By decision dated February 24, 2017, OWCP denied modification of its December 9, 2015 decision.

A March 6, 2017 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated severe canal stenosis at C5-6 and spondylotic changes. A May 24, 2017 cervical MRI scan demonstrated central canal stenosis at C4-5 and C6-7 without significant interval change.

On June 16, 2017 Dr. Nambiuur Vidyashanker, a Board-certified neurologist, noted that appellant had begun having neck pain after a fall. He diagnosed cervical radiculopathy and a history of chronic headaches beginning in April 2012.

On December 21, 2017 Dr. Dressel opined that appellant's employment injury had aggravated her neck pain and caused increased migraines such that she was unable to work. He advised that a 2017 MRI scan had shown severe flattening of the cord at C5-6.

On February 23, 2018 counsel requested reconsideration.

By decision dated May 1, 2018, OWCP denied modification of its March 3, 2015 decision.

Subsequently, OWCP received a February 1, 2018 report from Dr. Tatiana Nabioullina, a Board-certified neurologist, who noted that appellant had a history of migraines that had worsened after a fall in 2012. Dr. Nabioullina diagnosed chronic migraine, tension headache, and paresthesia of the hands. She provided no opinion regarding appellant's ability to perform work duties. Dr. Dressel also signed the report on February 13, 2018.

In a July 16, 2018 report, Dr. Nabioullina diagnosed chronic migraine and cervical spinal stenosis.

Appellant submitted progress reports dated May 31, June 8, and December 12, 2018, and March 15, 2019 from Dr. Dressel. On March 15, 2019 Dr. Dressel diagnosed lumbar back pain, asthma, benign essential hypertension, and insomnia.

On August 14, 2018 Dr. Stewart J. Tepper, a Board-certified neurologist, provided a history of the 2012 employment injury. He diagnosed intractable chronic post-traumatic headache, intractable chronic migraine medication.

In a report dated April 15, 2019, Dr. Dressel advised that he had treated appellant since 2012 for chronic neck pain from cervical spondylosis and stenosis and myelopathic symptoms affecting the upper extremities. He opined that her fall had aggravated her pain and triggered near daily migraines and tension headaches. Dr. Dressel indicated that appellant's neck pain and migraines prevented her from working. He provided his review of her medical treatment and asserted that her migraines were likely triggered by her severe cervical stenosis. Dr. Dressel found that appellant was at maximum medical improvement and unable to work.

On April 26, 2019 appellant requested reconsideration. She maintained that Dr. Dressel had discussed her deteriorating condition. Appellant related that she had continued pain and unsteadiness due to right ankle pain and weakness that limited activity, and noted that she required walking aids. She asserted that her ankle injury and need for ambulatory devices had caused increased obesity, a fluid retention issue, unsteady gait, pain in her knee, hip, and back, and an aggravation of preexisting cervical disc degeneration as shown by MRI scans. Appellant questioned OWCP's reference to a hand x-ray.² She noted that Dr. Warnock had not seen her or reviewed objective evidence since his September 2014 examination. Appellant maintained that Dr. Tepper found that her fall had caused additional medical conditions.

By decision dated May 9, 2019, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA³ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

² In its May 1, 2018 decision, OWCP referenced an x-ray of the hand, obtained by Dr. Dressel on August 29, 2017, due to appellant's complaints of an injury to her right fifth finger.

³ *Supra* note 1.

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. She contended that Dr. Dressel had found that her condition had worsened. Appellant described physical difficulties resulting from her ankle injury, including problems with her gait and an aggravation of a preexisting cervical degenerative disc condition. She indicated that Dr. Warnock had not examined her since 2014. Appellant asserted that Dr. Tepper determined that her fall had resulted in additional conditions. Her lay review of the medical evidence, however, is not relevant to the underlying issue of whether she has established further disability or residuals of her accepted April 24, 2012 employment injury.⁹ The Board has held the submission of evidence or argument, which does not address the particular issue involved, does not constitute a basis for reopening a case.¹⁰ Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹¹

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *See M.P.*, Docket No. 20-0814 (issued January 26, 2021).

¹⁰ *See C.C.*, Docket No. 20-0950 (issued October 29, 2020); *T.V.*, Docket No. 19-1504 (issued January 23, 2020).

¹¹ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. Appellant submitted a February 1, 2018 report from Dr. Nabioullina, who diagnosed chronic migraine, tension headaches, and paresthesia of the hands. Dr. Nabioullina provided a history of the April 24, 2012 employment injury, but did not provide a specific, independent opinion regarding whether appellant was disabled due to her accepted employment injury. As noted, the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹²

Appellant further submitted progress reports from Dr. Dressel dated May 31, 2018 through March 15, 2019 and an August 14, 2018 report from Dr. Tepper. In these reports, neither physician addressed the relevant issue of whether she had continued disability or residuals due to her accepted employment injury and, thus, the submission of this evidence is irrelevant and therefore insufficient to warrant reopening her case for further merit review.¹³

On April 15, 2019 Dr. Dressel noted that he had treated appellant beginning 2012 for chronic neck pain from cervical spondylosis and stenosis and myelopathic symptoms affecting the upper extremities. He asserted that her fall had aggravated her pain and triggered almost daily migraines and tension headaches such that she was unable to work. Dr. Dressel attributed appellant's migraines to her cervical stenosis. His report, however, is substantially similar to his November 18, 2016 report previously considered by OWCP. The Board has long held that evidence that repeats or duplicates evidence already of record, or is cumulative in nature, has no evidentiary value, and does not constitute a basis for reopening a case.¹⁴ Appellant has not provided relevant and pertinent new evidence and, thus, is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹⁵

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁶

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹² *J.K.*, Docket No. 20-0591 (issued August 12, 2020); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

¹³ *Id.*

¹⁴ *J.V.*, Docket No. 19-0990 (issued August 26, 2020); *D.M.*, Docket No. 18-1003 (issued July 16, 2020).

¹⁵ 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹⁶ *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board